No. 89-850



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

**ROBERT G. CRONSON, AUDITOR GENERAL OF THE STATE OF ILLINOIS,**

*Petitioner,*

vs.

**CHICAGO BAR ASSOCIATION and CERTAIN INDIVIDUAL MEMBERS THEREOF, DAVID C. HILLIARD, THOMAS Z. HAYWARD, JR., JOHN D. HAYES, CYNTHIA CHASE, ROBERT L. PATTULLO, JR.; ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS; and STATE BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF ILLINOIS,**

*Respondents.*

**On Petition For Writ Of Certiorari To The Illinois Supreme Court**

## CONSOLIDATED REPLY OF PETITIONER ROBERT G. CRONSON TO RESPONDENTS' BRIEFS IN OPPOSITION

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## REPLY OF PETITIONER CRONSON

Respondents do not dispute the facts set forth in the Petition, namely, that the Illinois Supreme Court (a) did not wish to submit a portion of its finances to public audit; (b) instructed its agencies, ARDC and BLE, to resist such audits; (c) repeatedly announced prejudgments of the controlling legal issues; (d) litigated against Auditor General Cronson in lower courts through its agencies and advocates; and, finally, (e) assumed jurisdiction over its own case and ruled in its own favor. Neither do respondents contend that the federal issues were not timely raised and preserved at each appropriate stage of these proceedings. Rather, respondents largely rely upon arguments that Cronson is a "state officer", not a "person", and, hence, may not invoke the protection of the Due Process Clause of the Fourteenth Amendment. Respondents also contend that the Illinois court's conduct did not rise to the level of a due process infraction and, in any event, was necessitated by the fact that the recusal and substitution of judges sought by Cronson was "constitutionally prohibited." See, *e.g.*, BLE Br. at 1-3.

### A. Cronson Has Standing As A Person Entitled To Invoke Fourteenth Amendment Due Process Protection.

Respondents' arguments on standing rest upon the following misinterpretations of Cronson's position, both as a *defendant* in the case below and as petitioner herein.

1. Cronson was sued individually and as a "person" in the Circuit Court case, as shown by the initial pleadings therein.[1] Accordingly, the assumption that he was sued

[1] The instant case against Cronson was commenced in the Circuit Court of Cook County on July 26, 1982. He was named in the summons and the original complaint filed on that date solely as an

(Footnote continued on following page)

as an official only is without foundation. Equally erroneous is any suggestion that Cronson has held himself out as the sovereign in this case. In no pleading has he purported to speak as the State of Illinois or as its relator.

2. Cronson has a direct personal stake in this case. He is a tenured official under the Illinois Constitution and Illinois State Auditing Act, subject to removal "for cause" and sworn to "faithfully discharge the duties of the office." Ill.Rev.Stat., 1987, Ch. 15, Sec. 302-6. Cronson's interest in upholding this responsibility and in carrying out his assigned duty to defend the audit process is therefore a personal as well as an official one. *Cf. Board of Education v. Allen*, 392 U.S. 236, 241 (1968).

3. Cronson introduced evidence at trial that he himself is a registered non-practicing attorney paying the same court-mandated license fees, whose proper administration and stewardship he seeks to uphold. Def. Ex. Tab 42 filed May 6, 1986. These fees are hardly *de minimis*. The court's published schedule currently requires an annual fee payment of $140. Ill.S.Ct.Rule 756(a)(1). During the period of this litigation alone, Cronson has thus been required to pay into the court's fund an aggregate of over $1,000. This is a more concrete property stake, one more closely linked to the subject matter of the dispute, than the taxpayer's interest which was deemed sufficient to confer standing in *Flast v. Cohen*, 392 U.S. 83, 106 (1968).[2]

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[1] *continued*
individual defendant without any suggestion that he was being sued in an official capacity. When ARDC and BLE filed their joint amended complaint on July 15, 1984 pursuant to the realignment order, Cronson was named as an individual, followed by the words "Auditor General of the State of Illinois". Again, in no sense was he named in the amended complaint "as Auditor General" or in any official position.

[2] It is noteworthy, as pointed out by CBA (Br. at ii), that the five individual attorneys (the CBA members named in the cap-

-(Footnote continued on following page)

4. As pointed out in his Petition (at 11, n. 10 regarding *jus tertii* standing), Cronson has acted not only for himself, but for the citizens of the State, whose property rights include audit safeguards to insure that public funds are properly administered in an open atmosphere of public accountability. See, *e.g.*, Ill.Rev.Stat., Ch. 15, Secs. 301-2(b); 303-12. Thus, this case cannot be dismissed as a mere abstract or intramural dispute as respondents seek to portray it. Rather, at the heart of this case are property interests which are quite real and very substantial in magnitude.[3]

Respondents insist that Cronson can have no standing to litigate in a representative capacity because the funds in question must now, as a result of the Illinois Supreme Court's decision, be conclusively deemed "non-public"; *ergo*, Illinois citizens have no such protectable interests for Cronson to assert. ARDC Br. at 14. This, of course, begs the question, for it was this very interpretation

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[2] *continued*

tion herein) joined the CBA in its complaint against Cronson, thereby asserting that *their* personal property interests would be affected by the outcome of the dispute over audit of the court's fund.

[3] Failure to afford Cronson an effective means before an impartial Illinois tribunal to seek correction of the audit decision below can have major repercussions for the preservation of sound financial practices in Illinois. The position of the Illinois Supreme Court, which it sustained by its own order denying Cronson review, is that only funds raised through taxation and appropriated by the Legislature are "public". Under such an interpretation, upwards of $4.3 billion of state receipts from licenses, fees, penalties and the like, heretofore undisputed as to their public nature and regularly audited, may escape future annual audits. Annual Report (1984) of Roland W. Burris, Comptroller of Illinois; Def. Ex. Tab No. 45. Further, CBA (at 2) seeks to reassure this Court that no serious property issue is present because the Illinois court has arranged its own private audits of itself and has offered copies of audit reports to Cronson. If public audits are constitutionally required, however, it is obvious that such self-help by the auditee is no proper substitute for the public auditor's function.

which was reached through a flawed decisional process by a court which was itself a partisan in the dispute. To now contend that the court's decision to uphold its own view of "public funds" operates to deprive Cronson of any standing to ask for procedural due process is ironic in the extreme.

Cronson, by virtue of his office and his statutory litigation authority, is situated in a position of direct relationship to other citizens of Illinois whose property rights are being affected. Further, as seen at note 3 herein, the underlying litigation has a significant impact on third-party interests. Under these circumstances, *jus tertii* standing is appropriate. *Cf. Caplin & Drysdale v. United States*, 491 U.S. ____, 105 L.Ed.2d 528, 540 n. 3 (1989).

5. Finally, respondents ignore the fact that Cronson was not a *plaintiff* in the underlying case and, hence, in invoking Fourteenth Amendment due process protection, his rights and standing are to be measured by the fact that he was selected and sued *as a defendant*. It was the Illinois Supreme Court, acting through its two controlled agencies, ARDC and BLE, and the CBA as its avowed surrogate, that in 1982 selected Cronson as a party and prosecuted the case below against him as defendant.

In declaring Cronson a "non-person" under the Fourteenth Amendment, powerless to complain of procedural due process deprivations, ARDC places heavy reliance on this Court's recent decision in *Will v. Michigan Department of State Police*, 491 U.S. ____, 105 L.Ed.2d 45 (1989). There, the Court held that a State and state officials, sued as such, are not "persons" capable of responding to liability claims under 42 U.S.C., § 1983. However, this ruling does not relate to those "persons" protected by the Fourteenth Amendment. The instant case is not a Section 1983 or other civil rights action whereby Cronson seeks damages or other affirmative relief. But even more fundamen-

tally, the word "person" in the Fourteenth Amendment relates not to the target of liability, as in Section 1983, but rather, to the *object* of the Amendment's protection. There, it is the "State" whose misconduct is proscribed: "* * * nor shall any State deprive any person of life, liberty, or property without due process law." The word "person" as used in the Fourteenth Amendment is the individual or entity aggrieved and deserving of protection when the Amendment is violated.

Perhaps for these reasons, this Court has never, to date, held that state officers are unable to qualify as "persons" entitled to the basic protections afforded by the Fourteenth Amendment. ARDC itself has admitted the absence of any such direct authority. Br. at 11. Yet, it urges an interpretation which is tantamount to saying that procedural due process becomes optional in any suit where, as here, the defendant happens to occupy a state office. This cannot be the law.

The other "person" and standing cases cited by respondents are likewise inapposite. In *Baxley v. Rutland*, 409 F.Supp. 1249 (M.D. Ala. 1976) the Alabama Attorney General sought to bring a suit, as purported relator for his State, seeking to attack certain of that State's own legislative enactments. The court denied standing, noting the incongruity of asserting such a conflicting role in behalf of a state. *Id.* at 1253. The court also implied that standing *would* be upheld in the more traditional situation where the officer was sued to defend a particular enactment or position. *Id.* at 1254.

Nor is *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) controlling here. *Katzenbach* involved an effort to test the conformity of the Voting Rights Act of 1965 to the requirements of the Fifth Amendment. The Court ruled that South Carolina, suing in its own capacity as a sovereign, was not a "person" within the meaning of

the Fifth Amendment's Due Process Clause. But Cronson, of course, neither acted as a plaintiff below nor did he profess to litigate as the sovereign State of Illinois.

Whether the case below be viewed as a "personal-capacity" suit or as an "official-capacity" suit against Cronson "as Auditor General of the State of Illinois", he has standing to protest when, once having been sued, he is involuntarily exposed to a procedure devoid of fundamental fairness:

> Submission to a fatally biased decision-making process is in itself a constitutional injury sufficient to warrant injunctive relief * * * [*United Church of the Medical Center v. Medical Center Comm'n*, 689 F.2d 693, 701 (7th Cir. 1982).]

Also impacted from the outset of the Illinois court's self-inspired litigation below were Cronson's *liberty* interests. After having been brought into the case by agents and representatives of the court, Cronson was effectively deprived of a fair opportunity to litigate the important audit issues, particularly at the final and most crucial appellate stage of the State's adjudicatory process.[4] As a result, Cronson's freedom to carry out his prescribed duties was curtailed and the range of his permitted actions was narrowed.

Fair access to the full range of traditional procedures (even discretionary ones), in and of itself, constitutes a

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[4] CBA asserts that Cronson has no cause to complain because he had his day in two lower courts before coming before the Illinois Supreme Court. Br. at 3. The fact that Cronson had an opportunity to litigate in the trial court and the intermediate Illinois Appellate Court, which may not have been under any direct due process disability, does not diminish his right of access to a fair state court of last resort when the State's judicial enactments confirm such a right to apply for an appeal as they do in Illinois. *Evitts v. Lucey*, 469 U.S. 387 (1985). Because due process rights extend to the full range of judicial mechanisms, such rights cannot be truncated or retarded in the appellate process. *Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981).

"liberty" interest which inheres in Cronson as well as to other citizens called to court as defendants. His effective exclusion from the opportunity fairly to advance his defense in a judicially impartial environment is no different in principle than the "access-to-court" dilemma facing the excluded divorce litigants in *Boddie v. Connecticut*, 401 U.S. 371 (1971). Here, Cronson's entitlement to an unbiased proceeding before an independent and disinterested judiciary, was denied just as certainly as if the courthouse door had been barred to him. In *Boddie*, this Court held that a state's filing fee restrictions regarding divorce litigants obstructed their access to the judicial process and, thus, immediately and concurrently impaired their fundamental liberty:

> * * * [A]t that point [when a defendant is sued] the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy. [*Id.* at 376.] (Brackets supplied.)

This Court further added:

> [D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.
>
> * * *
>
> . . . an individual [must] be given an opportunity for a hearing *before* he is deprived of a significant property interest . . . [*Id.* at 377, 379 (emphasis in original).]

**B. The Due Process Violations Have Been Numerous And There Was No Case Of Necessity.**

BLE (at 5) and CBA (at 3) suggest that petitioner's sole ground for making out a due process violation is the failure of the court below to recuse four justices, constituting a controlling majority, and to appoint successors, *pro hac*

*vice*, form an Illinois court to review the Petition for Leave to Appeal from the Appellate Court decision. But the refusal of certain members of the court below to step aside in favor of an impartial tribunal or even to address the federal due process issue cannot be viewed in isolation. As set forth in the Petition, due process violations by acts of bias, prejudgment, and control of litigation through the state Supreme Court's agencies have been numerous and continuous since 1977. Underlying all of these acts was the court's intense concern with control and oversight of its institutional funds—an interest which is conceptually no different than the disqualifying roles disapproved by this Court in both *Tumey v. Ohio*, 273 U.S. 510, 532-533 (1927) (direct pecuniary interest of mayor not "only reason" for denial of due process; interest in financial condition of Village a factor as well), and in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

Respondents repeatedly assert that the Illinois courts' procedures did not rise to the level of due process violations, but they fail to articulate why this is so. In the same manner, respondents dismiss Cronson's contentions about the Rule of Necessity with conclusionary statements that the court had no choice but to take the case and deal adversely with Cronson. They assert that "no provision is made for substitution [of judges under Illinois law] * * *", ARDC Br. at 22, or, even more pointedly, that "* * * the substitutions sought by petitioner were constitutionally *prohibited*." BLE Br. at 13; emphasis added. Nowhere, however, do they attempt to address the language of the recusal/temporary service provisions invoked by Cronson or to explain why the position taken by the court below is even colorably correct.[5]

[5] Contrary to respondents' contentions, this is surely not a necessity case comparable to *United States v. Will*, 449 U.S. 200 (1980), or a case where

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ARDC's brief seriously misstates *Perlman v. First National Bank of Chicago*, 60 Ill.2d 529, 331 N.E.2d 65 (1975), in relation to the due process issues of recusal and temporary appointment of four justices *pro hac vice*. That case does not hold that the Illinois constitutional "authority to assign justices does not extend to the Supreme Court of Illinois when there is a full complement of sitting justices." ARDC Br. at 24. Further, it does not support respondents' statement that "the petitioner's request that substitute justices be appointed is inconsistent with the decisions of the Illinois Supreme Court." ARDC Br. at 25. Nor does it constitute an authority for the proposition that "[w]here recusal has occurred and the constitutional requirement for concurrences is an impossibility, the Appellate Court decision becomes the conclusive adjudication * * *. Br. at 25. The clear meaning of *Perlman* is that four Illinois justices refused to exercise their constitutional authority to appoint two temporary substitute justices, *pro hac vice*.

The fact is that under existing Illinois constitutional provisions, the door was open for the court freely to recuse

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[5] *continued*

> * * * accepting [appellant's] expansive contentions might require the disqualification of every judge in the State. [BLE Br. at 14, quoting from *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986).]

Here, Cronson is challenging only the participation of four of Illinois' several hundred judges. The remainder have not been enmeshed in the audit controversy. Even more dubious is the suggestion that under Cronson's bias formulation, *no* state Supreme Court, no matter how constituted, could deal with the audit case concerning the court's finances. BLE Br. at 15-16. The simple answer to this is that even if the solution sought by Cronson is less than perfect, the four recusals would have greatly improved the chances for fairness and diminished the due process infirmity. After having made clear his willingness to abide by a decision of a supreme court reconstituted in that manner, Cronson would obviously be obliged to stand by that commitment.

and reassign judges for this single cause, without any violence to its quorum, its numerical complement, or its operating authority. Such an exercise of discretion would not only have served the salutary purpose of preserving federal due process rights; it would also have been unassailable as a final decision of a state supreme court relative to its own procedures. Here, however, the court reached hard for a contrary interpretation and would not even comment on the due process implications of its action. This is truly a case of a court needlessly creating its own "necessity" in order to prevail in litigation and to escape due process accountability.

Respectfully submitted,

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